No. 91-568

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CLAXTON R. COOK and MABLE E. COOK,
Petitioners,

versus

ATLANTIC RICHFIELD COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 4, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Is a party precluded from raising an argument on appeal where such argument was not made in a post-judgment motion before the District Court?

2. Under Rule 46, Federal Rules of Civil Procedure, is a party precluded from raising an argument on appeal, which was not first raised in the District Court, where the party did not have an opportunity to make its position known prior to the District Court's ruling?

PARTIES

The parties to the appeal before the United States Court of Appeals for the Tenth Circuit were Claxton R. Cook and Mable E. Cook, plaintiffs in the District Court, appellants in the Court of Appeals and petitioners herein. Atlantic Richfield Company was the defendant in the District Court and the appellee in the Court of Appeals.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED FOR REVIEW ...	i
PARTIES ...	ii
REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS ...	1
GROUNDS FOR JURISDICTION IN THIS COURT ...	1
STATUTES AND RULES INVOLVED IN THE CASE ...	2
STATEMENT OF THE CASE ...	2
REASONS FOR ALLOWING THE WRIT ...	3
CONCLUSION ...	8
APPENDIX A – Order and Judgment of U.S. Court of Appeals, 10th Circuit (July 9, 1991) ...	A-1
APPENDIX B – Order of U.S. District Court for the Western District of Oklahoma (January 15, 1985) ...	B-1

TABLE OF AUTHORITIES

Page(s)

Cases

Sherill v. Royal Industries, 526 F.2d 507 (8th Cir. 1975) 6

Statutes

28 U.S.C. §1254(1) 1

Rules

Fed. R. Civ. P. (46) 2

Fed. R. Civ. P. (59) 6

Miscellaneous

9 Wright and Miller, *Federal Practice and Procedure*, §2472 ..... 4, 7

9 Wright and Miller, *Federal Practice and Procedure*, §59.14 6

9 Wright and Miller, *Federal Practice and Procedure*, §4672 7

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REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

Neither the Opinion of the District Court nor the Opinion of the Court of Appeals were reported in any reporter. Those Opinions are set forth in the Appendix hereto.

GROUNDS FOR JURISDICTION IN THIS COURT

This Petition for a Writ of Certiorari seeks review of the Order and Judgment of the United States Court of Appeals for the Tenth Circuit, Case No. 90-6096, filed and entered by that Court on July 9, 1991. No request for a rehearing was made, nor is there any other order granting any extension of time in which to file the Petition for Writ of Certiorari. Jurisdiction in this Court is conferred under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

Rule 46, Federal Rules of Civil Procedure.

"Exceptions unnecessary.

"Formal exceptions to rulings or orders of the Court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which the party desires the Court to take or the party's objection to the action of the Court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party."

STATEMENT OF THE CASE

This action was commenced in the District Court by petitioners' filing of their Complaint on July 19, 1983. The defendant, when it filed its Answer, also filed a Motion to Compel Arbitration. Since the defendant took the position that no binding contract existed between the parties, the District Court found that defendant had no standing under Oklahoma law to seek an Order of Arbitration. Thereafter, the parties engaged in extensive discovery and trial preparation.

The case was scheduled for trial in January, 1985; on November 14, 1984, defendant filed a motion with the District Court, again seeking an Order of Arbitration, while at the same time

denying the contractual nature of the relationship between the parties. In response, petitioners advised the District Court that it had previously ruled on this very motion, such constituting the law of the case at that time. Defendant then filed a Reply Brief in which it, for the first time, acknowledged the contract between the parties. One week later, on January 15, 1985, the District Court granted defendant's motion and entered an Order staying proceedings and ordering arbitration.

Petitioners filed a Motion for New Trial, which was denied by the District Court. Thereafter, an arbitration award was made by a private arbitration panel, and confirmed by the District Court over petitioners' objection. On appeal, petitioners urged the Court of Appeals to reverse the District Court, *inter alia,* for the reason that defendant had waived its right to seek an Order of Arbitration by engaging in activities inconsistent with the assertion of that right.

The Court of Appeals for the Tenth Circuit affirmed the District Court. In its Order and Judgment rendered July 9, 1991, the Court of Appeals dismissed petitioners' argument because it was raised for the first time in the Court of Appeals.

REASONS FOR ALLOWING THE WRIT

This case presents the United States Supreme Court an opportunity to review an aspect of Rule 46 of the Federal Rules of Civil Procedure not previously addressed by any court to date. As stated above, Rule 46 provides that, while a party no longer needs to make formal

exceptions to preserve error, a party must make a timely objection stating the grounds for the objection, in order for it to be considered on appeal. An exception to this rule exists if a party has no opportunity to object prior to the ruling. In such a case, the Rule states that "the absence of an objection does not thereafter prejudice the party."

Since its adoption, neither Congress nor this Court has amended Rule 46. At the same time, neither this Court nor any lower Court appears to have reported a decision construing this exception. See 9 Wright and Miller, *Federal Practice and Procedure*, §2472, page 460.

The reason for the absence of authority is most likely that it is difficult to imagine how such a situation would occur. In most cases, a party always has an opportunity to speak by way of objection before a court makes a ruling. However, under the unique facts herein, the District Court ruled without allowing petitioners an opportunity to object. Here, the appellee filed a Reply Brief in Support of its Motion for Partial Summary Judgment. In the Reply Brief, (filed without leave of Court — a local requirement) appellee materially changed its position and admitted that a document known as the "Thixton Letter" was a legally binding contract; throughout the litigation, appellee steadfastly denied that any such contract existed. Appellee maintained this position in its original Motion for Partial Summary Judgment. Appellants answered, taking the position they had consistently maintained through the litigation, that since ap-

pellee denied the contract, then the appellee could not demand the Court enforce an arbitration provision therein.

The District Court had scheduled the matter for trial within two (2) weeks of the filing of the Reply Brief. In the Reply Brief, appellee materially changed its position and acknowledged that a contract did exist after all. Appellee then renewed its Motion for Arbitration. Without asking appellants for their response to this new position, the trial court granted the motion, ordered arbitration, and administratively closed the case. The District Court thus afforded appellants no opportunity to object prior to the Court's order, which the Court based on the new ground urged by appellee. This case fits clearly under the Rule 46 exception.

The case then proceeded to arbitration. The arbitration process lasted more than four years. After the arbitrators finally ruled, appellants challenged the decision of the arbitrators, filing a Motion to Vacate the arbitration award. The trial court overruled appellants' motion, precipitating appellants' appeal to the Court of Appeals for the Tenth Circuit.

On appeal, appellants argued that the Court erred in granting appellee's Motion to Arbitrate without allowing appellants an opportunity to respond prior to the ruling. The Court of Appeals stated that appellants should have made this argument in the Motion to Vacate. The Court of Appeals refused to consider appellants' argument that appellee had waived any claim for arbitration by electing to litigate the case for more than 10 months.

By requiring appellants to make an objection to the trial court's ruling without allowing an opportunity to make the same exalts form over substance.

Under Rule 59 of the Federal Rules of Civil Procedure, a Motion for New Trial is not essential to save objections made prior to the trial for appellate review. *Sherrill v. Royal Industries,* 526 F.2d 507 (8th Cir. 1975). In *Sherrill* the Court reasoned that once a party objects, it has no further need to reiterate its objection in a Motion for New Trial.

The reason the courts have used for not limiting appeals to issues raised in a Motion for New Trial is that once notified of an error, it is unnecessary to raise the error in a Motion for New Trial. See 9 Wright and Miller, *Federal Practice and Procedure,* §59.14.

Here, appellants raised the objection to arbitration by actively opposing arbitration throughout the proceedings. Also, throughout the proceedings, the trial court denied appellee's Motion to Arbitrate. It was only when appellee reversed its position in a Reply Brief by admitting the contractual nature of a key document, that the Court ordered arbitration. Appellants had no opportunity to respond to this material change in position. The District Court reversed itself and ordered arbitration. Moreover, the Court administratively closed the file and sent the matter to arbitration. This action by the Court foreclosed the appellants from any opportunity to object prior to its ruling, squarely fitting within the Rule 46 exception.

Here appellants had no opportunity to raise, prior to the Court's ruling, the objection of waiver of arbitration. Accordingly, appellants could not object prior to the Court's ruling. Thus, this case fits the narrow exception of Rule 46 where no objection is necessary to preserve an issue for appeal as appellants had no opportunity to make this objection, or any other objection for that matter, prior to the Court's ruling.

As no Court, including this Court, has ever construed this precise exception, this Court should grant certiorari in order to give all the lower courts a definitive construction of Rule 46. As stated in 9 Wright and Miller, *Federal Practice and Procedure*, §2472, "how such a situation would arise is difficult to conceive and there does not seem to be any reported civil cases construing it." 9 Wright and Miller, *Federal Practice and Procedure*, §4672, page 470.

Such a situation exists here. Despite all the clear standards of the exception existing in this case, the Court of Appeals held that the absence of such an objection in the Motion to Vacate precluded this issue from consideration on appeal.

The Court should grant certiorari to correct the decision of the Court of Appeal and clarify the exception to Rule 46.

CONCLUSION

For the foregoing reasons, petitioners request that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

FILED
July 9, 1991
United States Court of Appeals
Robert L. Hoecker, Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-6096
(D.C. No. Civ-83-1717-R)
(W.D. Okla.)

CLAXTON R. COOK and MABLE E. COOK,
Plaintiffs-Appellants,

vs.

ATLANTIC RICHFIELD COMPANY,
Defendant-Appellee.

ORDER AND JUDGMENT*

Before LOGAN, BALDOCK and BRIGHT,** Circuit Judges.

Plaintiffs-appellants Claxton and Mable Cook owned surface acreage and mineral rights in Payne County, Oklahoma. In 1979, an agent of defendant-

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable Myron H. Bright, Senior United States Circuit Judge, Eighth Circuit, sitting by designation.

appellee Atlantic Richfield Company approached plaintiffs, offering to lease their mineral acreage for oil and gas exploration. Negotiations between the agent and plaintiffs culminated in an oil and gas lease together with a letter governing defendant's use of plaintiffs' surface acreage. Soon thereafter, defendant began exploration, but ignored the covenants in the letter. Plaintiffs filed this diversity action, alleging breach of contract and seeking damages. Defendant moved for dismissal, or in the alternative, arbitration pursuant to the Oklahoma Arbitration Act, Okla. Stat. Ann. tit. 15 §§ 801-818 (West 1991). In sum, defendant contended that the letter was not a contract, but that if it were a contract, it would contain an enforceable arbitration clause. The court denied the motion to dismiss and also declined to order arbitration due to defendant's refusal to admit the contractual nature of the letter. Later, approximately one month before the scheduled trial date, the court ordered arbitration after defendant admitted the contractual nature of the letter and renewed its request for arbitration. Plaintiffs contend that (1) defendant waived its right to arbitration by waiting until the "eve of trial" to admit the contractual nature of the letter, and (2) the district court erred in failing to vacate the resulting arbitration award on account of the arbitration panel's refusal to consider claims for punitive damages. We affirm.

Plaintiffs conceded at oral argument that they did not argue waiver of arbitration to the district court. They claim instead that the issue is properly before us for the first time on appeal because they did not have the opportunity to raise it below. Yet they fail to explain why they did not raise it in their motion to vacate the arbitration award. Because plaintiffs did not pursue this issue, which would necessitate a fact-intensive inquiry below, we deem

it " 'inappropriate for consideration on appeal.' " *Adams-Arapahoe School D. 28-J v. Continental Ins. Co.*, 891 F.2d 772 (10th Cir. 1989) (quoting *Stephens Ind., Inc. v. Haskins & Sells*, 438 F.2d 357, 361 (10th Cir. 1971)).

Regarding plaintiffs' second issue, we review *de novo* the district court's legal determination not to vacate the arbitration award. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, applies to any arbitration provision which involves interstate commerce, and interstate commerce is interpreted very broadly. *See Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986). Federal law, therefore, preempts in most situations. In this case, however, the district court applied the Oklahoma Arbitration Act because it lacked sufficient information to determine whether the contract involved interstate commerce. Regardless of the propriety of this determination, the point is moot because the Oklahoma Act tracks the federal legislation in all aspects relevant to this case. We therefore will apply federal law in reviewing the district court's determination. *See Foster*, 808 F.2d at 41 (applying federal law).

In reviewing the record of the proceedings below we find no error. Before this dispute was referred for arbitration, the parties agreed to a partial settlement. *See* I R. doc. 43. As part of the settlement, the issue of whether punitive damages were included in the settlement agreement was to be determined by the arbitration panel. *Id.* at 2. The panel, in turn, determined that the partial settlement included punitive damages and therefore precluded an award of such damages in arbitration. Plaintiffs contend that this was a refusal to hear evidence material to the controversy, and therefore warrants vacation of the arbitration award. *See* 9 U.S.C. § 10 (vacation appropriate if arbitrators "refus[ed] to hear evidence pertinent and material to the controversy"). We do not

agree. The panel's legal determination that punitive damages were precluded by the partial settlement agreement made all evidence of such damages immaterial, and because this legal determination was within the panel's authority by virtue of the parties' stipulation, the district court properly denied to vacate the award. *See id.* § 10 (a)(5) (award subject to vacation if arbitrators "exceed[ ] their powers"). This is not to say that the panel's legal interpretations are not reviewable. If the interpretation ignores the plain language of the agreement, the resulting award may be vacated on account of lack of authority. *See Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 635 (10th Cir. 1988). But this narrow review does not encompass mere misapplications of law. "Even if the panel misread the contract, we may not reverse for that reason alone." *Id.* at 635. Upon review of the record, we cannot say that the panel ignored the language of the settlement agreement. Therefore, we must affirm the district court's refusal to vacate the award.

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX B

FILED
January 15, 1985
United States District Court
Nancy Estep, Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CIV 83-1717-R

CLAXTON R. COOK and MABLE E. COOK,
Plaintiffs,

vs.

ATLANTIC RICHFIELD COMPANY,
a Pennsylvania corporation,
Defendant.

ORDER

The Plaintiffs brought this action sounding primarily in contract against the Defendant pursuant to 28 U.S.C. § 1332 (1982). The Defendant has filed a Motion for Partial Summary Judgment pursuant to Fed. R. Civ. P. 56, to which the Plaintiffs have responded in opposition. The motion has been fully briefed, and the Court is now prepared to dispose of it with this Order.

On May 30, 1979 negotiations between the litigants hereto culminated in the execution of an oil and gas lease granted by the Plaintiffs as lessors to the Defendant as lessee. The Defendant participated in these negotiations through the person of W.R. Thixton, who apparently obtained the Plaintiffs' ap-

proval of the proposed lease by tendering a signed letter ("the Thixton letter") which outlined a series of covenants governing the relationship between the lessors and the lessee. The Plaintiffs have maintained throughout this action that the Thixton letter is part of the contract between the parties, the terms of which have been breached by the Defendant. However, the Plaintiffs have alternatively asserted that the Thixton letter, if not part of the contract, was a fraudulent inducement to enter into the lease. Under this alternative theory, the Plaintiffs seek either rescission or reformation of the lease.

The Defendant's Motion for Partial Summary Judgment raises two issues for the Court's consideration. The first is whether the Plaintiffs' claim for rescission is barred either by operation of 15 O.S. 1981 § 235 or by the equitable doctrine of laches. The Court is satisfied that summary judgment on this issue is inappropriate. The factual record is simply too incomplete to support the conclusion that, as a matter of law, the Plaintiffs are estopped from asserting their claim for rescission by delay in asserting their rights. Factual issues remain, and to the extent that the Defendant seeks summary judgment on this issue it must be denied.

The second issue raised by the Defendant's motion is whether the Court should require the parties to submit their disputes to arbitration. The Defendant urges the Court to do so, relying on the following provision in the Thixton letter:

> 11. *Appointment of appraisers.* In the event an issue involving damages or liability arises during the term of this lease and the parties thereto cannot reach an agreement as to the fair dollar amount, three disinterested persons shall be selected to determine said amount of damages. One person shall be selected by the lessee and one person shall be

> selected by the lessor and the third shall be selected by the other two appraisers. The decision agreed to by the three appraisers shall be binding on the parties hereto. The cost of the appraisal shall be born [sic] equally by both lessee and lessor.

This Court has previously refused to order arbitration in this case, noting that the Defendant denied both the contractual nature of the Thixton letter and Thixton's authority to bind the Defendant thereto. *Cook v. Atlantic Richfield Co.*, No. CIV-83-1717-R, *slip op.* at 3 (W.D. Okla. June 22, 1984). However, in renewing its motion the Defendant has admitted that Thixton possessed the authority to bind the Defendant with the letter. Further, in its reply brief the Defendant has abandoned its challenge to the Thixton letter as outside the written contract between the parties. Thus, the Court concludes that the Thixton letter is part of the contract between the litigants, a conclusion well supported by substantive law in addition to the Defendant's admission. *See Stanolind Oil & Gas Co., v. Bridges,* 160 F. Supp. 798, 801 n. 8 (E.D. Okla. 1958); *Nelson v. Golden,* 84 Okla. 29, 202 P. 308, 310 (1921); *Brake v. Blain,* 49 Okla. 486, 153 P. 158, 160 (1915). *Cf.* 15 O.S. 1981 § 158; *Strickland v. American Bakery & Confection Workers Union,* 527 P.2d 10, 13 (Okla. 1974); *Herrington v. Murphy,* 446 P.2d 595, 597 (Okla. 1968). *See generally* 4 S. Williston, A Treatise on the Law of Contracts § 628 (3rd ed. 1961). Having reached this conclusion, the Court must now determine whether the provision mentioned above mandates arbitration of the claims present in this action.

Notwithstanding the Plaintiffs' protestation to the contrary, the Court is satisfied that the clause in question is an arbitration agreement governed by Oklahoma's Arbitration Act of 1978, 15 O.S. 1981

§ 801-818.[1] The Act is to be liberally construed to give full force and effect to arbitration agreements. *See* 15 O.S. 1981 § 802(A). *Cf. Voss v. City of Oklahoma City*, 618 P.2d 925, 928 (Okla. 1980) ("When arbitration has been contracted for it constitutes a substantive and mandatory right."). Thus, the Court concludes that the arbitration agreement herein is entitled to enforcement under the Oklahoma Arbitration Act.

The Plaintiffs argue that the Court should decline to order arbitration in this action because the Defendant has not shown "the opposing party's refusal to arbitrate." 15 O.S. 1981 § 803(A). While it is true that the Act contains such a requirement, its absence does not preclude an arbitration order in this case. Where "the opposing party denies the existence of the agreement to arbitrate", the Court is empowered to resolve the dispute and order arbitration if appropriate. *Id.* As noted above, the Plaintiffs contend that the clause in question is not an enforceable arbitration agreement, a contention this Court has rejected. Having resolved the dispute in favor of a valid agreement to arbitrate, the Court may now order the parties to arbitrate and stay these proceedings while arbitration is pending. *See* 15 O.S. 1981 § 803(D). Thus, to this extent the Defendant's Motion for Partial Summary Judgment is granted.

In summary, the Defendant's Motion for Partial Summary Judgment is denied in part and granted in part. The parties are hereby ordered to submit the claims in this action to arbitration as required by the contract and the Oklahoma Arbitration Act. Proceedings in this action are ordered stayed pending the

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[1] It is perhaps arguable that the arbitration clause in question is governed by the federal Arbitration Act of 1947, 9 U.S.C. § 1-14 (1982). However, the parties have presented no evidence to support a finding that the contract herein evidences "a transaction involving [interstate] commerce." 9 U.S.C. § 2 (1982). Thus, the Court chooses to apply the very similar Oklahoma Act.

outcome of arbitration. This action is closed administratively until such time as the parties advise the Court that the arbitrators' decision should be confirmed, modified or vacated by this Court. *See* 15 O.S. 1981 § 811-13.

IT IS SO ORDERED this 15th day of January, 1985.

David L. Russell
United States District Judge

Entered in Judgment Docket on 1-15-85